IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O.O.CJ.

APPEAL NO. 658 OF 2006
IN
ARBITRATION PETITION NO.295 OF 2006

Hemant D. Shah and others .. Appellants
v/s.
Chittaranjan D. Shah and others .. Respondents

Mr. Rohit Kapadia, senior counsel with Mr. Pradeep Sancheti, Mr. R.I. Chagla, Mr. Simil Purohit and Mr. H.K. Sudhakara i/by M/s. Khaitan & Co. for the Appellants.

Mr.Ketan Parekh with Mr. Denzil D'Mello for the respondent Nos.1 to 4 and 6.

Mr. Aspi Chinoy, senior counsel with Mr. S.U. Kamdar and Mr. G.C. Mohanty for the respondent No.8.

CORAM : R.M.LODHA &
S.A.BOBDE, JJ.

DATED : 5TH SEPTEMBER, 2006.

P.C.

We heard Mr. Rohit Kapadia, senior counsel for the appellants for quite some time.

2. The senior counsel straneously urged that the learned Single Judge ought to have held that the surplus of the sale proceeds i.e. A sum of Rs.5,00,00,000/- (Rupees Five crores) lying with the Debts Recovery Tribunal in the proceedings initiated by respondent No.7 against respondent No.8 could be considered as the subject matter of the arbitration proceedings because the respondent No.8 was nothing but an alter-ego of the respondent

Nos.1 to 6. He submitted that in the facts and circumstances of the case, the learned Single Judge ought to have lifted the corporate veil of the respondent No.8 to see the real men behind the veil and these persons are respondent Nos.1 to 6.

3. The submissions do not appeal us.

4. It is an admitted position that prior to the present petition under section 9 of the Arbitration and Conciliation Act, 1996 (for short `the Arbitration Act') filed by the present appellants, an application for restraint order was made by the present appellants under section 17 of the Arbitration Act against the respondent No.8 herein. The Arbitrator directed the respondent No.8 herein viz. Manish Estates Pvt. Ltd., the company incorporated under the Companies Act not to apply to the Debts Recovery Tribunal for withdrawal of the surplus amount receivable by them to the extent of Rs.5,00,00,000/- (Rupees Five crores). The said order dated 29th September, 2005 passed by the Arbitrator was carried in appeal by the present respondent No.8. The learned Single Judge of this court by order dated 14th July, 2006 set aside the order of the Arbitrator. While doing so, the learned Single Judge held that an interim order under section 17 can be made by the Arbitral Tribunal against the other party to the arbitration proceedings but not against a party which is not party to the arbitration proceedings or for that matter, the arbitration agreement. The learned Single Judge, thus, held that the order passed by the Arbitrator under section 17 was beyond section 17 and the competence of the Arbitrator. The learned Single Judge refused in that appeal to lift the corporate veil as suggested by the present appellants.

5. Thereafter, the petition under section 9 of the Arbitration Act was filed by the present appellants interalia for the following prayers:-

> "(a) that pending the hearing and final disposal of the arbitration proceeding by the Lt. Arbitrator this Hon'ble Court be pleased to order and direct the Respondent Nos.1 to 6 to provide security and/or to deposit the sum of Rs.19,32,00,000/- (Rupees Nineteen Crores Thirty Two Lakhs only) with simple interest thereon @ 24% per annum from 01.01.1997 as per the Particulars of Claim annexed as Exhibit `V' above with the Prothonotary & Senior Master of this Hon'ble Court.
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> (b) that pending the hearing and final disposal of the Arbitration by the Ld. Arbitrator, the Respondent No.7 be restrained by an order and injunction of this Hon'ble Court from disbursing the surplus of the sale proceeds of the Worli Property i.e. A sum of Rs. 5 crores to Respondent No.8.
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> (c) that pending the hearing and final disposal of the arbitration proceedings by the Ld. Arbitrator the Respondent No.8 be restrained by an order and injunction of this Hon'ble Court from receiving the surplus of the sale proceedings i.e. A sum of Rs.5 crores of the Worli Property from Respondent No.7.
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> (d) In the alternative and strictly without prejudice to prayer (b) above, pending the hearing and final disposal of the arbitration proceedings by the Ld. Arbitrator this Hon'ble Court be pleased to order the attachment of the surplus of the sale proceedings of the Worli Property i.e. A sum of Rs.5 crores in the hands of the Respondent No.8 in the event the surplus is disbursed by Respondent No.7 to Respondent No.8.

(d1) that pending the hearing and final disposal of the Arbitration by the Learned Arbitrator, the Respondent Nos.1 to 6 be ordered and directed to jointly and severally to take all necessary steps, including issuing mandate/instructions (including by passing requisite resolutions, if necessary) to the Respondent No.8, and/or its servants, agents, managers, representatives and Directors, not to deal with the surplus sale proceedings of Worli property; i.e. A sum of Rs.5 crores (or any other amount) which the Respondent No.8 is claiming from the Respondent No.7; and/or which may be received by Respondent No.8 from Respondent No.7; in any manner whatsoever either by way of payment or transfer or adjustment or otherwise;"

6. The arguments before the learned Single Judge centered around the appellants' prayer for the restraint order against respondent No.8 (Manish Estates Pvt.Ltd.) from withdrawing surplus of the sale proceeds of Worli property i.e. the sum of Rs.5,00,00,000/- (Rupees five crores).

7. The learned Single Judge while considering the petition under section 9 of the Arbitration Act held that the amount of Rs.5,00,00,000/- (Rupees five crores) lying in a deposit with the Debts Recovery Tribunal in the proceedings of the respondent No.7 against the respondent No.8 cannot be said to be the subject matter of dispute in arbitration. The learned Single Judge held that the respondent No.8 is an independent entity and not a party to the arbitration agreement and, therefore, property of respondent No.8 cannot be the subject matter of dispute in the arbitration proceedings. Having held so, the learned Single Judge dismissed the arbitration petition.

8. That the respondent No.8 is not party, to the arbitration proceedings, is not in dispute. It could not be because it is not party to the arbitration agreement. The question is, in a dispute between the two parties to the arbitration agreement if the property belonging to the third party is brought in dispute, can such property belonging to third party be said to be the subject matter of dispute between the parties to the agreement. We do not think so. The forum of Arbitral Tribunal is chosen by the parties to the agreement for resolution of disputes amongst them. Obviously, in such proceeding the rights of third party in the property in which the parties to the arbitration agreement has no right, title or interest, cannot be affected. It needs no elaboration that the arbitration proceeding is not to adjudicate an action in rem i.e., the determination of the status of a particular thing that binds all persons. Rather it is adjudication inter parties. By no stretch of imagination, in arbitration proceedings, pursuant to the memorandum of understanding between the appellants and the respondent Nos.1 to 6, the status of the property owned by respondent No.8 viz. Rs.5,00,00,000/- (Rupees five crores) lying in surplus on sale of Worli property can be determined. In other words, in respect of the property in which neither of the parties to the agreement has any right, interest or title cannot be the subject matter of dispute in the pending arbitration proceedings between the parties. If what cannot be done finally on the conclusion of the arbitration proceedings, surely it cannot be done in the proceedings under section 9 of the Arbitration Act which is in aid of the final award that may be passed by the Arbitral Tribunal. In this view of the matter, the amount of Rs.5,00,00,000/- (Rupees five crores) lying in the Debts Recovery Tribunal as surplus of sale proceeds of the Worli property belonging to respondent No.8 is not and cannot

be a subject matter of dispute in the arbitration proceeding. The prayer for interim relief made by the appellants under section 9 with regard to the said property, in our view, was wholly misconceived and cannot be said to have been wrongly rejected by the learned Single Judge.

9. We also do not find any substance in the contention of the senior counsel for the appellants that the court should lift the corporate veil of the respondent No.8 to find the real persons behind the veil. In our view this exercise cannot be done in the proceedings under section 9 of the Arbitration Act. Nothing has been shown to the contrary and more so at the back of the corporate entity.

10. All in all, we are satisfied that the learned Single Judge did not commit any error in dismissing the petition under section 9 of the Arbitration Act.

Appeal is dismissed in limine.

(R.M.LODHA, J.)

(S.A.BOBDE, J.)